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CIMB Bank Bhd v Sivadevi a/p Sivalingam

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-62–08 OF 2018(J)
AHMAD MAAROP PCA, RAMLY ALI, ALIZATUL KHAIR, ROHANA YUSUF AND ZAWAWI SALLEH FCJJ
15 NOVEMBER 2019

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Limitation — Charge — Application for order for sale of charged land — Whether such application could be time-barred under Limitation Act 1953 ('LA') — Whether chargee had to apply for order for sale within 12 years of chargor's default in complying with Form 16D notice under NLC — Whether D *view that limitation period ran from time chargor defaulted under the loan agreement and not from time chargor defaulted under the Form 16D notice correct — Whether s 21(1) of the LA only barred chargee's action to recover monies secured by charge and not its statutory right to apply for order for sale of the security — Whether application for order for sale an 'action' — Whether if LA did not* E *apply to a chargee's statutory right to apply for order for sale chargee could sit on its rights and not issue a Form 16D notice for years to detriment of chargor — Whether in such event defaulting chargor could show 'cause to contrary' on legal or equitable grounds why order for sale should not be made — National Land Code ss 256, 256(3)*

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The appellant ('CIMB') had granted the respondent ('Sivadevi') a loan that was secured by a charge upon Sivadevi's land under the National Land Code ('the NLC'). When Sivadevi defaulted in the loan repayment (the last payment was made on 12 May 2003), CIMB began proceedings to obtain an order for sale G of the land. In January 2016, CIMB served on Sivadevi a Form 16D notice under the NLC giving her 30 days to remedy her breach under the charge. On her failure to remedy the breach, CIMB applied to the High Court in August 2016 for an order for sale of the land by way of public auction. The court granted the order for sale in November 2016. Sivadevi successfully appealed to H the Court of Appeal ('the COA') to set aside the order for sale on the ground that CIMB's foreclosure proceedings were time-barred under the Limitation Act 1953 ('the LA'). The COA held that: (a) the foreclosure proceedings fell under s 21(1) of the LA which stated that an action to enforce a charge of land to recover monies thereby secured had to be brought within 12 years from the I date when the right to receive the money accrued; (b) CIMB's 'right to receive the money accrued' arose when Sivadevi breached her contractual agreement to pay the sum secured by the charge and that breach occurred on 12 May 2003 when she defaulted in her loan repayment; and (c) as the cause of action accrued on 12 May 2003, limitation under s 21(1) of the LA had set in by the

time CIMB applied for the order for sale. The COA further opined that the limitation period could not be computed from the time a chargor failed to comply with a Form 16D notice because a chargee could well sit on its rights and not issue a Form 16D notice for years, to the chargor's detriment. In the instant appeal against the COA's decision, CIMB asked the Federal Court to determine, inter alia, whether: (i) s 21(1) or 21(2) of the LA applied to proceedings commenced by a chargee for an order for sale of real property under the NLC; and (ii) if s 21(1) was the applicable provision, whether the date when the right to receive the monies secured by the charge arose when the chargor defaulted under the loan agreement or when the chargor failed to comply with the Form 16D notice. Section 21(1) of the LA provided that 'No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of 12 years from the date when the right to receive the money accrued'.

Held, unanimously (but for different reasons) allowing the appeal, setting aside the COA's decision and reinstating the decision of the High Court:

(1) (**per Ahmad Marop PCA**) When CIMB applied to enforce the registered charge by way of an order for sale, s 21(1) of the LA applied to such an action. The application came within the ambit of an action 'to enforce such mortgage or charge' under s 21(1) of the LA. An application for an order for sale under s 256 of the NLC was not the commencement of an action. The chargee was not suing for a debt but was merely enforcing/exercising his statutory remedy against the defaulting chargor (see paras 19–20).

(2) (**per Ahmad Marop PCA**) A breach by the chargor of the agreement in the charge, even one which had continued for a period of one month or more, did not make 'the right to receive the money accrued'. The cause of action had not arisen yet to entitle the chargee to apply for an order for sale. It was only when the chargor defaulted in complying with the Form 16D notice that 'the whole sum secured by the charge shall become due and payable to the chargee' (s 254(3)(a) of the NLC). It was on that date that 'the right to receive the money accrued' and the date when the cause of action arose to entitle the chargee to apply for a judicial order for sale (s 254(3)(b) of the NLC). In this case, since the order for sale was applied for about 2 1/2 years after the chargor's default in complying with the Form 16D notice, the application was not barred by limitation under s 21(1) of the LA (see paras 24 & 26).

(3) (**per Rohana Yusuf FCJ, concurring**) Section 21(1) of the LA had no application to proceedings commenced by a chargee for sale of land pursuant to ss 256 or 260 of the NLC. Section 21(1) only applied to 'an

action' — ie, an action to recover money secured by a mortgage or charge, and had no application to the exercise of a chargee's statutory right under the NLC to obtain an order for sale. As held by high authority, a chargee applying for an order for sale under s 256 of the NLC did not commence an action or sue for a debt. A sale under ss 256 or 260 of the NLC was a judicial sale ordered by the court on the application of the chargee. While s 21(1) of the LA could bar an action to recover monies secured by a charge or mortgage, it could not bar a charge action for the sale of the security (see paras 58, 61–63 & 68).

(4) (**per Rohana Yusuf FCJ, concurring**) Whilst the statutory defence of limitation did not apply to an application for an order for sale, there were other legal and equitable defences that were available to a defaulting chargor. If the chargee took forever to act or to enforce the charge, the chargor could avail of various equitable defences, such as laches or acquiescence, to show 'cause to the contrary' why the order for sale should not be made (see s 256(3) of the NLC). A cause to the contrary could occur if there was a breach of any rule of law or equity (see paras 65–66).

(5) (**per Rohana Yusuf FCJ, concurring**) Since an application for an order for sale always involved land, s 21(2) of the LA had no application to a charge action. Section 21(2) clearly applied to a foreclosure action in respect of mortgaged personal property. 'Personal property' was defined to exclude land (see s 2 of the LA). Section 21(2) therefore applied to any other property excluding land or chattels real (see para 69).

[Bahasa Malaysia summary

Perayu ('CIMB') telah memberikan responden ('Sivadevi') suatu pinjaman yang dijamin oleh suatu gadaian ke atas tanah Sivadevi di bawah Kanun Tanah Negara 1965 ('KTN'). Apabila Sivadevi gagal dalam bayaran balik pinjaman (bayaran terakhir dibuat pada 12 Mei 2003), CIMB telah memulakan prosiding untuk memperoleh perintah jualan tanah itu. Pada Januari 2016, CIMB telah menyampaikan ke atas Sivadevi notis Borang 16D di bawah KTN memberikannya 30 hari untuk meremedikan pelanggarannya di bawah gadaian itu. Oleh kerana kegagalannya untuk meremedikan pelanggaran itu, CIMB telah memohon kepada Mahkamah Tinggi pada Ogos 2016 untuk perintah jualan tanah melalui lelongan awam. Mahkamah telah memberikan perintah jualan pada ovember 2016. Sivadevi berjaya merayu kepada Mahkamah Rayuan ('MR') untuk mengetepikan perintah jualan itu atas alasan bahawa prosiding rampasan CIMB telah luput had masa di bawah Akta Had Masa 1953 ('AHM'). MR memutuskan bahawa: (a) prosiding rampasan terjatuh di bawah s 21(1) AHM yang menyatakan suatu tindakan untuk menguatkuasakan gadaian ke atas tanah untuk mendapat balik wang yang dijamin hendaklah dibuat dalam tempoh 12 tahun dari tarikh apabila hak untuk menerima wang itu terakru; (b) 'hak untuk menerima wang itu terakru' CIMB timbul apabila Sivadevi melanggar perjanjian kontraktualnya untuk

membayar jumlah yang dijamin oleh gadaian dan pelanggaran tersebut berlaku pada 12 Mei 2003 apabila dia gagal membuat bayaran balik pinjamannya; dan (c) oleh kerana kausa tindakan terakru pada 12 Mei 2003, had masa di bawah s 21(1) AHM telah bermula pada masa CIMB memohon untuk perintah jualan itu. MR selanjutnya berpendapat bahawa tempoh had masa tidak boleh dikira dari masa penggadai gagal untuk mematuhi notis Borang 16D kerana pemegang gadaian boleh tidak menggunakan haknya dan tidak mengeluarkan notis Borang 16D untuk bertahun lamanya, yang menjejaskan penggadai. Dalam rayuan ini terhadap keputusan MR, CIMB memohon Mahkamah Persekutuan untuk menentukan, antara lain, sama ada: (i) s 21(1) atau 21(2) AHM terpakai kepada prosiding yang dimulakan oleh pemegang gadaian untuk suatu peritah jualan hartanah di bawah KTN; dan (ii) jika s 21(1) adalah peruntukan yang boleh terpakai, sama ada tarikh pada masa hak untuk menerima wang yang dijamin oleh gadaian timbul apabila penggadai gagal di bawah perjanjian pinjaman atau apabila penggadai gagal mematuhi notis Borang 16D. Seksyen 21(1) AHM memperuntukkan bahawa 'No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of 12 years from the date when the right to receive the money accrued'.

Diputuskan, sebulat suara (tetapi dengan sebab-sebab berbeza) membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi:

(1) (**oleh Ahmad Marop PMR**) Apabila CIMB memohon untuk menguatkuasakan gadaian berdaftar melalui suatu perintah jualan, s 21(1) AHM terpakai kepada tindakan sedemikian. Permohonan itu terjatuh dalam skop suatu tindakan 'to enforce such mortgage or charge' di bawah s 21(1) AHM. Suatu permohonan untuk perintah jualan di bawah s 256 KTN bukan permulaan suatu tindakan. Pemegang gadaian tidak menyaman untuk suatu hutang tetapi hanya menguatkuasakan/melaksanakan remedy statutorinya terhadap penggadai yang gagal (lihat perenggan 19–20).

(2) (**oleh Ahmad Marop PMR**) Suatu pelanggaran oleh penggadai perjanjian dalam gadaian, walaupun satu yang telah berterusan untuk tempoh satu bulan atau lebih, tidak menjadikan 'the right to receive the money accrued'. Kausa tindakan tidak timbul apatah bagi melayakkan pemegang gadaian memohon untuk perintah jualan. Ia hanya apabila penggadai gagal mematuhi notis Borang 16D bahawa 'the whole sum secured by the charge shall become due and payable to the chargee' (s 254(3)(a) KTN). Dalam kes ini, oleh kerana perintah jualan telah dimohon lebih kurang 2 1/2 tahun selepas kegalgan penggadai mematuhi notis Borang 16D, permohonan itu tidak dihalang oleh had

masa di bawah s 21(1) AHM (lihat perenggan 24 & 26).

(3) (**per Rohana Yusuf FCJ, bersetuju**) Seksyen 21(1) AHM tidak terpakai kepada prosiding yang dimulakan oleh pemegang gadaian untuk jualan tanah menurut ss 256 atau 260 KTN. Seksyen 21(1) hanya terpakai kepada 'an action' — iaitu, suatu tindakan untuk mendapat balik wang yang dijamin oleh gadai janji atau gadaian, dan tidak terpakai kepada pelaksanaan hak statutori pemegang gadaian di bawah KTN untuk memperoleh perintah jualan. Sepertimana diputuskan oleh autoriti tertinggi, pemegang gadaian yang memohon untuk perintah jualan di bawah s 256 KTN tidak memulakan tidnakan atau saman untuk hutang. Suatu jualan di bawah ss 256 atau 260 KTN adalah jualan kehakiman yang diperintahkan oleh mahkamah atas permohonan pemegang gadaian. Di mana s 21(1) AHM boleh menghalang tindakan mendapat balik wang yang dijamin oleh gadaian atau gadai janji, ia tidak boleh menghalang tindakan gadaian untuk jualan jaminan itu (lihat perenggan 58, 61–63 & 68).

(4) (**per Rohana Yusuf FCJ, bersetuju**) Di mana pembelaan statutori untuk had masa tidak terpakai kepada permohonan untuk perintah jualan, terdapat pembelaan perundangan lain dan saksama yang tersedia kepada penggadai yang gagal itu. Jika pemegang gadaian mengambil masa untuk bertindak atau untuk menguatkuasakan gadaian, penggadai boleh mendapatkan pelbagai pembelaan yang saksama, seperti *laches* atau persetujuan, untuk menunjukkan 'cause to the contrary' kenapa perintah untuk jualan tidak patut dibuat (lihat s 256(3) KTN). Suatu kausa bertentangan boleh berlaku jika terdapat pelanggaran apa-apa rukun undang-undang atau ekuiti (lihat perenggan 65–66).

(5) (**per Rohana Yusuf FCJ, bersetuju**) Oleh kerana permohonan untuk perintah jualan selalunya melibatkan tanah, s 21(2) AHM tidak terpakai kepada suatu tindakan gadaian. Seksyen 21(2) jelas terpakai kepada tindakan rampasan berkaitan hartanah persendirian yang digadaijanjikan. 'Personal property' ditafsirkan untuk mengecualikan tanah (lihat s 2 AHM). Seksyen 21(2) dengan itu terpakai kepada mana-mana hartanah lain kecuali tanah atau rumah sebenar (lihat perenggan 69).]

Cases referred to

Dato Mohamed Hashim Shamsuddin v Attorney- General, Hong Kong [1986] 2 MLJ 112, SC (refd)

Jigarlal K Doshi@ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and Another Appeal [2013] 3 MLJ 61, CA (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (folld)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in

liquidation) v Bank Bumiputera (M) Sdn Bhd & Ors [1997] 2 MLJ 805, SC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, FC (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257, SC (refd)
Peh Lai Huat v MBF Finance Bhd [2011] 3 MLJ 470, CA (refd)
Perwira Affin Bank Bhd v Lim Weow [1998] 3 MLJ 56, CA (refd)
Phileoallied Bank (Malaysia) Bhd v Sakuntalathevy Manickavasagam [2007] 1 MLJ 581, HC (refd)
Prithipal Singh v Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, intervener) [1993] 3 MLJ 336, SC (folld)
PP v Ottavio Quattrocchi [2003] 1 MLJ 225, HC (folld)
S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd [2015] 5 MLJ 717, FC (refd)
Sathiyamurthi v Penguasa/Komandan, Pusat Pemulihan Karangan, Kedah [2006] 6 MLJ 593, FC (refd)
Tan Kong Min v Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601, FC (refd)
United Malayan Banking Corp Bhd v Chong Bun Sun and another application [1994] 2 MLJ 221, HC (refd)
Williams v Central Bank of Nigeria [2014] UKSC 10, SC (refd)
Wong Soon Kion v Cimb Bank Bhd [2018] MLJU 1847, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 6(1), 16(1), 78(1)
Criminal Procedure Code s 399(1)
Limitation Act 1953 ss 2, 6(1), 9, 9(1), 21, 21(1), (2), (4)
National Land Code ss 253, 254, 254(2), (3), (3)(a), (3)(b), 255, 256, 256(3), 257, 260, Form 16D, Form 16E
Rules of Court 2012 O 83
Rules of the High Court 1980 O 66
Limitation Act 1939 [UK] s 18
Limitation Act 1980 [UK] s 20

Appeal from: Civil Appeal No J-02(A)-59–01 of 2017 (Court of Appeal, Putrajaya)

Jeyanthini Kannaperan (Aarthi Jeyarajah and Pauline Koh with her) (Shearn Delamore & Co) for the appellant.
Pang Kong Seng (Yap Che Kai with him) (K S Pang & Co) for the respondent.

Ahmad Maarop PCA:

[1] We heard the appeal and reserved our decision. This decision is made and delivered pursuant to s 78(1) of the Court of Judicature Act 1964, as Justice Ramly Ali FCJ and Justice Alizatul Khair Osman Khairuddin FCJ have since retired. This decision is therefore the decision of the remaining members of the panel. The decision is that the appeal is allowed with costs. The decision of the Court of Appeal is set aside. The order of the High Court is reinstated.

[2] I have prepared a judgment containing reasons for the aforesaid decision. Justice Rohana Yusuf FCJ has written a separate judgment giving different reasons for the aforesaid decision. Justice Mohd Zawawi Salleh FCJ agreed with the judgment of Justice Rohana Yusuf.

[3] The following is my judgment.

[4] In this judgment the parties will be referred to as they were in the High Court.

[5] This is an appeal by the plaintiff against the decision of the Court of Appeal which had, on 6 March 2018, allowed the defendant's appeal against the order for sale in respect of the land held under Hakmilik Geran 308417, Lot 47137, Mukim Tebrau, Daerah Johor Bahru, Johor ('the said land').

[6] The background facts leading to the present appeal are these. By a letter of offer dated 12 October 1999, the plaintiff offered the defendant and Thamil Selvem a/l Savarimuthu ('the co-borrower'), a loan known as homexpress loan for the sum of RM185,320. A loan agreement was entered on 18 January 2000. Following the issuance of title to the said property; and in place of an earlier deed of assignment granted by the defendant to the plaintiff, a third party charge under the National Land Code ('the NLC') over the said land was presented and registered on 24 December 2014, as consideration and security for the homexpress loan granted to the defendant and the co-borrower. Pursuant to the terms of and conditions of the Homexpress Loan, the plaintiff made the loan available to the defendant, and the defendant and the co-borrower utilised the loan. The defendant then defaulted in repayment of the loan. It is not disputed that since the last payment received by the plaintiff on 12 May 2003, no further payment was made by the defendant and/or the co-borrower on the loan.

[7] On 20 November 2007, the plaintiff entered a default judgment against the defendant in Civil Suit No MT4-22–659 of 2007 filed in the High Court at Johor Bahru. On 9 January 2012, by consent that default judgment was set aside. The suit was withdrawn with liberty to file afresh.

[8] By a letter dated 29 January 2016, the plaintiff issued and served on the defendant the notice of default with respect to a charge in Form 16D pursuant to s 254 of the NLC to the defendant in which the defendant was given 30 days from the date of the notice to remedy the breach of the NLC charge. The period to remedy the breach in the NLC charge stated in the Form 16D expired and the defendant failed to remedy the default. The plaintiff then filed the originating summons ('the OS') dated 8 August 2016 (JA-24FC-1192–08 of 2016) in the High Court praying for an order for sale of the said land by public auction pursuant to ss 256–257 of the NLC. On 29 November 2016, the High Court allowed the OS and made an order for sale of the said land as prayed in the OS.

[9] The defendant appealed to the Court of Appeal which allowed it on 6 March 2018 and reversed the decision of the High Court.

[10] The application for leave to appeal to this court was granted to the plaintiff on the following questions ('leave application'):

No 1

(a) Whether proceedings commenced by a chargee for sale of land pursuant to Section 256 or Section 260 of the National Land Code 1965 is subject to Section 21(1) or Section 21(2) of the Limitation Act 1953;

Sama ada prosiding yang dimulakan oleh pemegang gadaian untuk penjualan tanah menurut Seksyen 256 atau Seksyen 260 Kanun Tanah Negara 1965 adalah tertakluk kepada Seksyen 21(1) atau Seksyen 21(2) Akta Had Masa 1953;

(b) If Section 21(1) of the Limitation Act 1953 applies to such proceedings, does the right to receive the money accrued (the right of action) or limitation period begin to run following failure to make payment of loan instalments (even when the loan only becomes payable upon demand issued by the charge) or upon failure to comply with the statutory demand in Form 16D?

Sekiranya Seksyen 21(1) Akta Had Masa 1953 terpakai bagi prosiding tersebut, adakah hak untuk menerima wang yang terakru (hak mengambil tindakan) atau tempoh had masa bermula berikutan kegagalan untuk membuat bayaran ansuran-ansuran pinjaman (walaupun pinjaman hanya harus dibayar setelah tuntutan telah dikeluarkan oleh pemegang gadaian) atau kegagalan untuk mematuhi tuntutan berkanun dalam Borang 16D?

(c) If Section 21(2) of the Limitation Act 1953 applies to the said proceedings, does the right to foreclose (right of action) or limitation period begin to run following failure to make payment of loan instalments (even when the loan only becomes payable upon demand issued by the charge) or upon failure to comply with the statutory demand in Form 16D?

Sekiranya Seksyen 21(2) Akta Had Masa 1953 terpakai bagi prosiding tersebut, adakah hak untuk haling tebus (hak mengambil tindakan) atau tempoh had masa bermula berikutan kegagalan untuk membuat bayaran ansuran-ansuran pinjaman

(walaupun pinjaman hanya harus dibayar setelah tuntutan telah dikeluarkan oleh pemegang gadaian) atau kegagalan untuk mematuhi tuntutan berkanun dalam Borang 16D?

No 2

(a) Whether proceedings commenced by a charge for sale of land pursuant to Section 256 or Section 260 of the National Land Code 1965 is subject to Section 9 of the Limitation Act 1953?

Sama ada prosiding yang dimulakan oleh pemegang gadaian bagi penjualan tanah selaras dengan Seksyen 256 atau Seksyen 260 Kanun Tanah Negara 1965 tertakluk kepada Seksyen 9 Akta Had Masa 1953?

(b) If Section 9 of the Limitation Act 1953 applies to the said proceedings, does the right of action or limitation period begin to run following failure to make payment of loan instalments (even when the loan only becomes payable upon demand issued by the charge) or upon failure to comply with the statutory demand in Form 16D?

Sekiranya Seksyen 9 Akta Had Masa 1953 terpakai kepada prosiding tersebut, adakah hak tindakan atau tempoh had masa bermula berikutan kegagalan untuk membuat bayaran ansuran pinjaman (walaupun pinjaman hanya perlu dibayar setelah tuntutan dikeluarkan oleh pemegang gadaian) atau kegagalan untuk mematuhi tuntutan berkanun dalam Borang 16D?

No 3

(a) Whether Sections 254-256 of the National Land Code 1965 in specifying the statutory notices to be issued and served before a charge is entitled to commence proceedings for an order for sale are substantive or procedural law?

Sama ada peruntukan-peruntukan dalam Seksyen-Seksyen 254–256 Kanun Tanah Negara 1965 yang mensyaratkan notis-notis statutory untuk dikeluarkan dan disampaikan sebelum suatu pemegang gadaian berhak memulakan prosiding untuk suatu perintah jualan merupakan undang-undang substantive atau prosedur?

(b) Whether the provisions in Sections 254–256 of the National Land Code 1965 apply such that despite non-issuance of the Statutory Demand in Form 16D, the chargee's right to pursue remedy under Section 256 or Section 260 of the National Land Code is triggered?

Sama ada peruntukan-peruntukan dalam Seksyen-Seksyen 254–256 Kanun Tanah Negara 1965 terpakai di mana walaupun Tuntutan Berkanun dalam Borang 16D tidak dikeluarkan, hak pemegang gadaian untuk meneruskan remedy di bawah Seksyen 256 atau Seksyen 260 Kanun Tanah Negara dicetuskan?

No 4

(a) Whether a chargee's right to enforce a charge against a chargor accrues afresh pursuant to Section 26 of the Limitation Act 1953 from the date of acknowledgment of the debt by the co-borrower, admitted as authorised to represent the chargor?

Sama ada hak pemegang gadaian untuk menguatkuasakan suatu gadaian terhadap penggadai terakru semula menurut Seksyen 26 Akta Had Masa 1953 dari tarikh

pengakuan hutang oleh peminjam bersama yang diakui telah diberi kuasa untuk mewakili penggadai?

No 5

Whether the cause of action and/or limitation period for proceedings for sale of land commenced pursuant to the National Land Code can run before the National Land Code Charge is created?

Sama ada kausa tindakan dan/atau tempoh had masa untuk prosiding halang tebus untuk penjualan yang dimulakan selaras dengan Kanun Tanah Negara boleh bermula sebelum Gadaian Kanun Tanah Negara diwujudkan?.

THE DECISION OF THE COURT OF APPEAL

[11] The sole issue before the Court of Appeal was whether the foreclosure proceedings or proceedings for an order for sale taken by the plaintiff was time-barred.

[12] The essence of the Court of Appeal's decision is as follows: s 21(1) of the Limitation Act 1953 ('the LA') provides the following three types of application:

(a) any action to recover any principal sum of money which is secured by a mortgage or other charge of land or personal property;

(b) any action to enforce such a charge of land or personal property; and

(c) any action to recover the proceeds of sale of land or personal property;

[13] The Court of Appeal ruled that, s 21(1) applies to both land and personal property, using the two terms distinctly just as in the case of mortgage and charge since by the definition in s 2, 'personal property' does not include 'land' while land includes chattels real and immovable property. By that same definition, a charge would fall within the meaning of the term 'land' as a charge creates a legal and equitable interest in the land. Therefore, by definition and by the express conditions and circumstances specified in s 21(1), an action in relation to a charge of land will not and cannot fall within the terms of s 21(2) as it applies to 'mortgaged personal property' that necessarily excludes land; or even under s 21(4) as the interest here is a charge and not a mortgage. Thus, the Court of Appeal said that it was unable to follow the decisions in *Peh Lai Huat v MBF Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & Another*.

[14] According to the Court of Appeal, the facts of the appeal before it concerned an action to enforce a charge of land with the single purpose of receiving money which had accrued (ie the second category stated above). Such an action falls within the terms of s 21(1) of the LA. The right to enforce a

charge under s 21(1) must be taken within 12 months calculated not from the right to such an order for sale accrued, but from the right to receive the money accrued. Where the chargor breaches the agreement to pay the sum secured by the charge, the chargee is correspondingly deprived by its right to receive the money accrued. It is at this point that the right to enforce charge arises and the right to sue or the cause of action accrues. The 12-year period under s 21(1) commences a month after the breach or after the chargee has been deprived of the right to receive the money accruing under the charge. This period does not alter the underlying contractual relationship between the parties. The in rem right over the subject land is conferred by reason of the contractual agreement between the parties and that right is fortified in law in that it is recognised as a valid registrable encumbrance over the subject land. Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the court under the terms of the National Land Code and O 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge. Federal Court's decision in *S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717 was cited as the authority in support. The Court of Appeal also said that if the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal*, the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s 253, would have been rendered meaningless and of no effect. If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the ad rem right of order of sale.

[15] The Court of Appeal then held that in the case before it, the event of default was the breach which occurred on 12 May 2003 when the defendant failed to service the repayment. The law of limitation set in on 12 May 2015. Since the plaintiff's originating summons seeking an order for sale was filed on 8 August 2016, the action was barred under s 21(1) of the LA.

SUBMISSION OF THE PLAINTIFF

[16] The essence of the submission of the plaintiff is as follows. Learned counsel for the plaintiff submitted that in determining the issue of limitation in the present case, the court should have in mind that the NLC charge was registered on 24 December 2014 following the issuance of separate title to the land and in place of an earlier deed of assignment granted by the defendant to the plaintiff as consideration and security for the loan granted to the defendant and her co-borrower. The proceedings in the High Court which were pursuant

to s 256 of the NLC and in accordance with O 83 of the Rules of Courts 2012 ('the ROC'), could only be filed by the plaintiff when a charge registered under the NLC was in place. As such, she submitted that it was entirely inconceivable that limitation in respect of the proceeding commenced by a 'chargee' starts to run even before such a charge is registered. Learned counsel contended that there was no right to ask for an order for sale accruing in favour of the plaintiff until such a charge is in place. As such it cannot be said that limitation set in from the date of default of repayment by the defendant. Based on the leave questions, learned counsel submitted as follows:

(a) proceedings commenced by a charge for sale of land should only be subject to s 21(2) of the LA as an action in rem;

(b) if the court is of the view that s 21(1) of the LA applies to the instant proceedings, then it should be construed in line with the established decisions of *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470 and *Jigarlal K Doshi@ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and Another Appeal* [2013] 3 MLJ 61, wherein limitation period does not start to run until failure to comply with the statutory demand in Form 16D;

(c) in line with the established decisions of *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470 and *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and Another Appeal* [2013] 3 MLJ 61, if s 21(2) of the LA were to apply to the present proceedings, the right to foreclose (right of action) or limitation period should then begin to run upon failure to comply with the statutory demand in Form 16D; and

(d) the provision under ss 254–256 of the NLC set out the chargee's right to pursue remedy under ss 256 or 260 of the NLC is triggered upon the issuance of the statutory demand in Form 16D.

SUBMISSION OF THE DEFENDANT

[17] The gist of the submissions by the learned counsel for the defendant is as follows:

(a) s 21(2) of the LA deals with foreclosure action of 'mortgaged personal property'. Under s 2 of the LA 'personal estate' and 'personal property' do not include land or chattels real. Thus, it is clear that s 21(2) of the LA would not be applicable to a proceeding for an application by a chargee for an order for sale of land;

(b) s 9 of the LA is not applicable as the present case concerns the enforcement of a charge to recover money due to the plaintiff as a chargee, and not an action to recover land;

(c) s 21(1) of the LA is applicable to an application by a chargee for an order for sale of land which actually is an enforcement of a charge by the chargee;

(d) when the defendant defaulted in repayment (breach of agreement), pursuant to cl 11.1(c) of the annexure to the charge, the plaintiff had the right to sell the land by public auction. Therefore, there exists 'the right to receive the money accrued' which entitled the plaintiff to enforce the charge by way of an order for sale. In the present case, the last payment was made on 12 May 2003. That was when the breach occurred and the right to receive the money accrued;

(e) the originating summons filed by the plaintiff on 8 August 2016; and

(f) was therefore barred by limitation.

DECISION OF THIS COURT

[18] All the leave questions concern the provisions relating to limitation which are applicable to an application for an order for sale under the NLC.

[19] When it filed the OS in the High Court, the plaintiff in effect applied to enforce the charge registered under the NLC by way of an order for sale of the charged land. In my view, s 21(1) of the LA applies to such an action. Section 21(1) provides:

> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or *to enforce such mortgage or charge*, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date *when the right to receive the money accrued*.

[20] The OS applying for an order of sale of the land charged under the NLC comes within the ambit of an action 'to enforce such mortgage or charge' under s 21(1) of the LA. In other words, the reading of s 21(1) in full in respect of a charge on land is as follows — no action shall be brought to enforce such charge (ie charge on land) after the expiration of twelve years from the date when the right to receive the money accrued. The question is, for the purpose of limitation in respect of such action, when does the cause of action arise? What is the date when the right to receive the money accrued? In considering the answer to the questions, it is useful as a starting point, to restate the nature of an application for an order for sale under the NLC. When a chargee makes an application for an order for sale in foreclosure proceeding under s 256 of the NLC, he does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee does not sue for a debt. His claim for an order for sale is not based on a covenant but under the registered charge. This is made clear by the Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, where in

delivering the judgment of the court Eusoff Chin SCJ (later CJ) said:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. *He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default*. The chargee, therefore, does not sue for a debt. It is also clear that *his claim for an order for sale is not based upon a covenant but under the registered charge*. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject. In *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almarhum Sultan Idris 1*, the appellant (chargee) had taken a summons under s 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated:
>
> > No Member of the Royal Family of Perak (*Waris Negri*) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident. (Emphasis added.)
>
> Apparently no permission had been obtained as required by the Order in Council. Thorne Ag CJ in the Court of Appeal held [at p 19]:
>
> > It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
> >
> > ... I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. The proceedings result not in a judgment or decree, but in making or refusal of an order of sale. (Emphasis added.)
>
> That decision was followed in *Murugappa Chettiar v Lechumanan Chettiar*; *Mercantile Bank of India v TF Egan & Anor*; and *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd*.

[21] Section 254 of the NLC provides:

> Section 254 *Service of default notice, and effect thereof.*
>
> (1) Where, in the case of any charge, *any such breach* of agreement as is mentioned in sub-section (1) of section 253 *has been continued for a period*

of at least one month or such alternative period as may be specified in the charge *which shall not be less than one month*, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it *to be remedied within one month of the date on which the notice is served*, or such alternative period as may be specified in the *charge which shall not be less than one month*; and

(c) warning the chargor that, *if the notice is not complied with, he will take proceedings to obtain an order for sale*.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice *the breach* in question *has not been remedied* —

(a) *the whole sum secured by the charge shall* (*if* it has not already done so) *become due and payable to the chargee; and*

(b) the *chargee may apply for an order for sale* in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

[22] Section 255 of the NLC provides:

Section 255 *Special provision with respect to sums payable on demand.*

(1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice is Form 16E, and in that event, if the sum in question *is not paid to him within one month of the date on which the notice is served*, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254.

(2) The provisions of sub-section (2) of section 254 shall apply to notices in Form 16E as they apply to notices in Form 16D.

[23] In *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputera (M) Sdn Bhd & Ors* [1997] 2 MLJ 805, in explaining the procedures under ss 254–255 of the NLC, Edgar Joseph Jr FCJ speaking for the Supreme Court said:

... upon a breach by the chargor of any of the agreements on his part expressed or implied in the charge continuing for at least a month or such alternative period as may be specified in the charge, notice in Form 16D is served specifying the breach and requiring the chargor to remedy the same within a month of the date of the

notice or such alternative period as may be specified in the charge, with a warning that in the event of non-compliance, proceedings to enforce the charge by obtaining a judicial sale will be commenced (s 254(1) of the Code). Under this provision, there will generally be a time lag of at least two months between the date of breach and the commencement of proceedings in court to enforce the charge. In the case of charges where the principal is payable on demand, s 255(1) of the Code provides an alternative procedure by requiring service of a notice in Form 16E, immediately upon such breach, requiring it to be remedied within a month and adding that in the event of non-compliance, proceedings to enforce the charge by obtaining a judicial sale may be forthwith commenced without it being required to serve a notice in Form 16D under s 254(1). Under this provision, there will be a time lag of at least a month between the date of breach and the commencement of proceedings in court to enforce the charge.

It is obvious that the advantage of the Notice requirements under ss 254 and 255 of the Code is that it will entail delay, thus affording opportunity to the chargor to bustle about to raise the money to pay the demands.

[24] A breach by the chargor of the agreement in the charge, even one which has been continuing for one month or for such alternative period shall not be less than a month, does not make 'the right to receive the money accrued'. Cause of action does not arise yet to entitle the chargee to apply for an order for sale. The chargee then has to serve on the chargor a notice in Form 16D specifying the breach in question, requiring the chargor to remedy the breach within one month from the date of service of the notice, and warning the chargor that if the notice is not complied with, the chargee will take proceedings to obtain an order for sale (ss 254(2) of the NLC). Then ss 254(3) of the NLC comes into play. If at the expiry of the period specified in the notice in Form 16D, the breach in question has not been remedied, then the 'whole sum secured by the charge shall become due and payable to the chargee'; (ss 254(3)(a) of the NLC). Thus, it is clear to me that it is on this date that 'the right to receive the money accrued'. It is on this date that the cause of action arises as it is at this stage that it is established that there is an existence a person who can sue and another who can be sued and all the facts have happened which are material to be proved to entitle the plaintiff to succeed (see *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601 (FC) per Alauddin FCJ, delivering the judgment of the Federal Court). Hence, it is upon the occurrence of the event under ss 254(3)(a) of the NLC as aforesaid which entitles the chargee to take proceedings to apply for an order for sale from the court (ss 254(3)(b) of the NLC).

[25] In *Perwira Affin Bank Bhd v Lim Weow* [1998] 3 MLJ 56 (CA) the Court of Appeal had the occasion to decide on the meaning of 'the right to receive the money accrued' under s 21(1) of the LA when it dealt with an application for an order for sale following the issue of the notice in Form 16E s 255 of the NLC. Under s 255 of the NLC, where the principal sum secured

by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E. In the event that the sum in question is not paid to him within a month from the date on which the notice is served, the chargee may apply for an order for sale without being required to serve a notice in Form 16D. The facts of the case as revealed in head notes are these. The respondent was the registered and beneficial owner of two pieces of property ('the property'). She created a third legal charge over the property in favour of the appellant ('the bank') as security for a loan facility granted by the bank to the borrowers. The borrowers subsequently defaulted in their obligation to repay the loan and the bank as the chargee commenced foreclosure proceedings against the respondent with the issue of a Form 16E notice under the National Land Code 1965 ('the NLC') on 2 November 1979. When the amount demanded was not paid within one month stipulated in the notice, the bank applied for an order for sale from the Land Administrator, Kuala Lumpur ('the land administrator') who held an enquiry and made an order for sale on 2 June 1981 ('the first order'). The auction was called off due to irregularities in the enquiry. The land administrator then commenced a fresh enquiry and made a new order for sale ('the second order') and fixed a new auction date. The second auction was also called off. Later, the respondent received a notice of the land administrator informing her that a new enquiry date had been fixed. The respondent applied to preclude the bank from carrying on with the sale on the ground that the second order made by the land administrator was a nullity and that the bank's claim to proceed with the sale under the first order was barred by limitation. The trial judge found that after 2 June 1982, the land administrator was *functus officio* and therefore the second order was invalid; and the only valid order for sale was the first order but the bank could not enforce it as it was barred by limitation under s 9(1) of the LA. The bank appealed. In the appeal, counsel for the respondent also maintained that even if s 9(1) was not applicable, s 21(1) of the Act was applicable and thus limitation had set in. In allowing the appeal, the Court of Appeal held that inter alia, that 'the right to receive the money accrued' under s 21(1) of the LA must refer to the time when the Respondent defaulted in her obligation to make payment after being served with Form 16E notice, after which time starts to run. Since the notice was served on the respondent on the same date it was issued (2 November 1979), the respondent had one month from that date to make payment. As the first order was made on 2 June 1981, the 12 year limitation period means that limitation had not set in as to render it unenforceable. In delivering the judgment of the Court of Appeal, Siti Norma Yaakob JCA said:

> Section 9(1) speaks of limitation in actions for the recovery of land. This appeal is concerned with *the enforcement of a charge to recover money due to the bank as chargee. That enforcement takes the form of a sale of the charged property under the provisions of the NLC* and under the supervision of the land administrator. As such, the appeal has nothing to do with the recovery of the lands charged and to that extent, s 9(1) is irrelevant to to the facts of the appeal. The learned trial judge erred when she

decided that s 9(1) applies so as to render the first order unenforceable by reason of limitation.

Counsel for the respondent nonetheless maintained that a parallel can be drawn from s 21(1) of the same Act and submitted that limitation had set in. The relevant provisions of sub-s (1) of s 21 read as follows:

> No action shall be brought to recover any principal sum of money secured by a … charge on land … or to enforce such … charge, … after the expiration of twelve years from the date *when the right to receive the money accrued*.

'The right to receive the money accrued' in s 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run. Since the notice was served on the respondent on the same date it was issued, ie 2 November 1979, the respondent had one month from that date within which to make payment. That brings us to 2 December 1979 and counting 12 years from that date takes us to 1 December 1991. It is not clear from the appeal records when the foreclosure proceedings were instituted in court but even taking the first order that was made on 2 June 1981, it is clear that limitation has not set in as to render the first order unenforceable.

[26] Reverting to the facts in the present appeal, the defendant defaulted in the repayment of the loan and since the last payment on 12 May 2003, no further payment was made by the defendant and/or her co-borrower. The defendant was therefore in breach of the agreement in the charge. By a letter dated 29 January 2016, the plaintiff issued and served on the defendant the notice in Form 16D, specifying the breach by the defendant of the agreement in the charge in failing to make payment of the loan in the amount of RM549,245.60 as on 15 December 2015 with interests. The defendant was also notified that the breach had been continued for of at least 30 days before the date of the notice, and that the defendant was required to remedy the breach within 30 days from the date of service of the notice. The defendant was also warned that if she fail to remedy the breach within the period as aforesaid, the plaintiff will apply for an order for sale (see pp 331–332 of Vol 2 of the appeal record). The defendant failed to remedy the breach within the period specified in the notice. At the expiry of the period to remedy the breach, the whole sum secured by the charge became due and payable to the plaintiff. On that date too 'the right to receive the money accrued'. It is on this date that the right to enforce the charge on the land accrued, and the time for the purpose of s 21(1) of the LA began to run. On 8 August 2016, the plaintiff filed the OS to apply for an order for sale. In my judgment therefore, the application by the plaintiff in the OS for an order for sale in this case was not barred by limitation under s 21(1) of the LA.

[27] I return to the leave questions. For the reasons stated above, my answer to question 1(a) is that proceedings commenced by a chargee for sale of land pursuant to ss 256 or 260 of the NLC is subject to s 21(1) of the LA. My answer

to question 1(b) is that in its application to proceedings by a chargee for sale of land pursuant to ss 256 or 260 of the NLC, the right to receive the money (the right of action) or limitation period begin to run upon failure to comply with the statutory notice in Form 16D of the NLC.

[28] My answers to the two questions as aforesaid are sufficient to dispose of the appeal. I find no necessity to answer the rest of the leave questions.

CONCLUSION

[29] In the result, the appeal is allowed with costs. The decision of the Court of Appeal is set aside. The order of the High Court is reinstated.

Rohana Yusuf FCJ:

[30] Before us, is an appeal which relates to the issue on the applicability of limitation laws to an application for an order for sale by public auction made pursuant to ss 256–257 of the National Land Code ('the NLC'). The High Court of Johor Bharu had granted an order for sale in respect of the land held under Hakmilik Geran 308417, Lot 47137, Mukim Tebrau, Daerah Johor Bahru, Johor ('the said land'). On appeal, it was set aside by the Court of Appeal on the ground that the application was made out of time as envisaged by s 21(1) of the Limitation Act 1953 ('the LA'). This resulted in the order for sale being set aside.

[31] We have heard the appeal, and we had reserved our decision. My learned brother Justice Ahmad bin Maarop, President of the Court of Appeal ('PCA') had prepared a judgment, and I have read that judgment in draft. I agree with the conclusion arrived in the draft judgment that the appeal of the appellant should be allowed and for the order of the High Court to be reinstated.

[32] I, however, with respect differ in my reasons for that decision, and my reasons are as stated in this judgment. I will refer to the acronym and the parties, as how they were referred to in the judgment of the learned PCA.

[33] For the purpose of my judgment, I will narrate the brief facts and they are these: The plaintiff offered the defendant together with Thamil Selvem a/l Savarimuthu as co-borrower, a loan facility known as homexpress loan. It was for the sum of RM185,320. They entered into a loan agreement on 18 January 2000 together with a deed of assignment to secure the loan facility. Following the issuance of title of the said land and in place of the deed of assignment, a third party charge under the NLC over the said land was presented and registered on 24 December 2014.

[34] The defendant defaulted in the repayment of the loan. It is not in dispute that the last payment received by the plaintiff was on 12 May 2003. The plaintiff entered a default judgment against the defendant in Civil Suit No MT4–22–659 of 2007 at the High Court of Johor Bahru on 20 November 2007. By consent, that default judgment was however set aside. The suit was withdrawn with liberty to file afresh.

[35] The plaintiff then issued and served on the defendant the Notice of Default. Form 16D issued pursuant to s 254 of the NLC was served on the defendant giving a period of 30 days to remedy the breach of the NLC charge. The 30 day period expired but the defendant did not remedy the default. The plaintiff proceeded to file an Originating Summons No JA-24FC-1192–08 of 2016 in the High Court on 8 August 2016 for an order for sale of the said land by public auction pursuant to ss 256–257 of the NLC. It was allowed by the High Court on 29 November 2016.

[36] The defendant appealed against the High Court decision. The Court of Appeal reversed the decision of the High Court, and set aside the order for sale. The main basis for doing so was because the Court of Appeal found that the application for the order for sale by the plaintiff was time barred by virtue of s 21(1) of the LA. According to the Court of Appeal, the application made by the appellant for order for sale was already in excess of 12 years. In computing the period from which time began to run, the Court of Appeal held that it should be computed from the time the cause of action arose, which was found to be from the failure of the defendant to service the loan on 12 May 2003. From the date of default to the application date of 8 August 2016, it was held that limitation under s 21(1) had already set in.

[37] In its grounds of judgment, the Court of Appeal had observed and stated as below:

> [30] Returning to the terms of s 21, we make the second material observation with particular focus on s 21(1). Breaking down its various components reveals that the provision envisages three contexts or types of actions in its application. The three types of actions are:
>
> (a) any action to recover any principal sum of money which is secured by a mortgage or other charge of land or personal property;
>
> (b) any action to enforce such a charge of land or personal property;
>
> (c) any action to recover proceeds of sale of land or personal property.
>
> [31] In any of those three contexts, the action must be brought within 12 years from the date when the right to receive the money accrued. The computation of the 12 year period is necessarily by reference to the date when the right to receive the money accrued since no other date is offered under the terms of s 21(1).

A [32] Further, s 21(1) applies to both land and personal property, using the two terms distinctly just as in the case of mortgage and charge since by the definition in s 2, 'personal property' does not include 'land' while land includes chattels real and immovable property. By that same definition, a charge would fall within the meaning of the term 'land' as a charge creates a legal and equitable interest in the land.

B

[33] Therefore, by definition and by the express conditions and circumstances specified in s 21(1), an action in relation to a charge of land will not and cannot fall within the terms of s 21(2), as it applies to 'mortgaged personal property' that necessarily excludes land; or even under s 21(4) as the interest here is a charge and not a mortgage. With this, we regret we are unable to follow the decisions in *Peh Lai Huat v MBF Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & Another*.

C

D **[38]** To better appreciate the full implication of s 21, below is how that section reads:

21 *Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land*

E (1) *No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge,* or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued. (Emphasis added.)

F **[39]** Reading the above quoted part of the grounds of judgment of the Court of Appeal, it is clear, that the Court of Appeal had construed s 21(1) of the LA to be applicable to three categories of actions as follows:

(a) any action to recover any principal sum of money which is secured by a mortgage or other charge of land or personal property;

G

(b) any action to enforce such a charge on land or personal property; and

(c) any action to recover proceeds of the sale of land or personal property

H **[40]** In categorising the three categories above the Court of Appeal had, in my view, failed to give emphasis to the role of the punctuation comma in that clause which appears after the word 'charge'. In my view, the proper construction of s 21(1) of the LA should instead be broken up into two categories only as below:

I

(a) an action to recover principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge; and

(b) an action to recover proceeds of the sale of land or personal property.

[41] The role of punctuation comma in a legal provision was decided by this court in *Dato Mohamed Hashim Shamsuddin v Attorney- General, Hong Kong* [1986] 2 MLJ 112. The case concerns the issuance of an ex parte order by the then Chief Justice Malaya, to allow evidence to be taken before the High Court upon a request by the Hong Kong High Court. The evidence was to be used in the pending criminal proceedings in Hong Kong. The order was made pursuant to O 66 of the Rules of the High Court 1980. An application to set aside that order was made on the basis that O 66 cannot apply to criminal proceedings and there was no statutory authority that empowered the High Court to make such an order. The application was dismissed.

[42] In dismissing that setting aside application, the Supreme Court first found that the enabling provision for O 66 was s 16(1) of the Courts of Judicature Act 1964. In the majority judgment of the Supreme Court, speaking through Abdoolcader SCJ at p 122 of the judgment, His Lordship had stated thus:

> To advert now to the question of the statutory source or enabling provision for the enactment of O 66, I would refer to the provisions of s 16 of the 1964 Act for rules of court to be made (by the Rules Committee constituted under s 17 of the 1964 Act) for the purposes specified therein, in paragraph (1) whereof states:
>
> > (1) *for regulating the taking of evidence before an examiner or on commission or by letters of request,* and for prescribing the circumstances in which evidence so taken may be read on the trial of an action. (Emphasis added.)

[43] Relying on the above s 16(1), it was submitted by learned counsel in that case that the word 'action' in the above provision connoted a civil action only and would not apply to criminal proceedings.

[44] In His Lordship judgment, Abdoolcader SCJ pointed out that the punctuation comma after the words 'letter of request' in that provision was significant. According to His Lordship, 'section 16(1) ... must be read disjunctively in the light of the comma ... and followed by the word 'and', hence the provision of paragraph (1) of section 16 relating to the regulating of the taking of evidence by letter of request apply equally to civil and criminal proceedings'.

[45] What this would mean is that the comma in s 16(1) above, had the effect of breaking the provision into two categories of cases:

(a) for regulating the taking of evidence before an examiner or on commission or by letters of request; and

(b) for prescribing the circumstances in which evidence so taken may be read on the trial of an action.

[46] In the case of *Sathiyamurthi v Penguasa/Komandan, Pusat Pemulihan Karangan, Kedah* [2006] 6 MLJ 593, this court had to construe s 399(1) of the Criminal Procedure Code in relation to its application to inquiry proceedings under the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998. It was argued that the report of the medical officer ought to have been served on the appellant pursuant to s 399(1). While the deputy public prosecutor took the position that s 399(1) applied only to inquiries conducted under the Criminal Procedure Code.

[47] The court then went on to consider s 399(1) as reproduced below:

> 399 Reports of certain persons
>
> (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him *for report may be given in evidence in any inquiry, trial or other proceeding under this Code* unless that person or Registrar shall be required to attend as a witness —
>
> (a) by the Court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial. (Emphasis added.)

[48] Augustine Paul FCJ, in that case at p 601 in para 15 held that the proceeding in question was in fact an inquiry conducted under s 6(1) of the Act. The issue was whether an inquiry came within the scope of s 399(1). In the words of Augustine Paul FCJ:

> The proceeding conducted under s 6(1) of the Act is no doubt an inquiry. The validity of the objection raised by learned counsel would thus depend on whether this inquiry comes within the scope of s 399(1). The applicability of s 399(1) to a particular proceeding is made patently clear by its explicit language. It states that a report '... may be given in evidence in any inquiry, trial or other proceeding under this Code ...' The words '... or other proceeding ...' are followed by the words '... under this Code'. The question for determination is whether this qualification is confined in its operation to just '...or other proceeding...' or also includes '... any inquiry, trial ...'. The rule of construction ... makes it clear that the absence of a comma before the words '... or other proceeding ...' means that the words '... under this Code ... must be construed conjunctively as applying to all the three categories of proceedings mentioned'.

[49] The court was referring to the rule of construction applied in *Public Prosecutor v Ottavio Quattrocchi* [2003] 1 MLJ 225 and *Prithipal Singh v Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, intervener)* [1993] 3 MLJ 336. The rule of construction applied in these cases makes '*it clear that the absence of a comma before the words* '*... or other proceedings ...*' *means that the words* '*... under this Code ...*' *must be construed conjunctively as applying to all the three categories of proceeding mentioned*. Section 399(1) thus applies to only inquiries, trials or other proceedings under the Criminal Procedure Code. The inquiry conducted by the magistrate pursuant to s 6(1) of the Act is one conducted under the provisions of the Act and not the Criminal Procedure Code. Section 399(1) thus has no application to such an inquiry'. (Emphasis added.)

[50] It was then held that s 399(1) thus, applied only to inquiries, trials or other proceedings under the Criminal Procedure Code. The inquiry conducted by the magistrate pursuant to s 6(1) of the Act is one conducted under the provisions of the Act and not the Criminal Procedure Code. Section 399(1) thus has no application to such an inquiry.

[51] Applying the above principle of construction, I am therefore of the considered view that s 21(1) of the LA must be construed as consisting only of two categories of action. The first part of that provision refers to an action to recover money and that part on 'to enforce such charge or mortgage' must be read conjunctively. What it means is that the phrase 'to enforce such mortgage or charge' is not a separate action but it relates to an action to recover money to enforce a charge. The second part is an action to recover proceeds of the sale of land or personal property.

[52] This position, in my view, is further amplified by s 21(4) of the LA which clearly states that 'Nothing in the preceding subsections of this section shall apply to a foreclosure action in respect of mortgaged land but the provisions of this Act relating to actions to recover land shall apply to such action'. In view that there is s 21(4) of the LA, the Act is meant to draw a distinction between actions to recover monies secured by a charge to that of an action to realise the charge security.

[53] 'Foreclose' or 'foreclosure action' are not defined in the LA. Understandably because the LA is enacted prior to the NLC. For years, and even until now, a chargee's action under the NLC to realise the charge is considered a 'foreclosure action'. This was decided by this court earlier in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266. The Federal Court then speaking through Salleh Abas CJ (Malaya) held that 'when section 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a

'charge' as understood and provided for, in Part Sixteen of our National Land Code'.

[54] It must be emphasised that s 21 is substantially in pari materia with s 20 of the UK Limitation Act 1980. This section substantially is based on s 18 of the UK Limitation Act 1939. That the 1980 provision is cast after the 1939 Act received express recognition by Salleh Abas CJ (Malaya) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*. In the English Supreme Court in *Williams v Central Bank of Nigeria* [2014] UKSC 10, at paras 47–48, Lord Neuberger briefly traversed the legislative history of the UK Limitation Act 1980 and commented that the 1980 Act is substantially an updated version of the 1939 Act.

[55] To be borne in mind is that, when we enacted our s 21(1) of the LA and later introduced the provisions relating to orders for sale under s 256 of the NLC, the Parliament had not provided any limitation period for those proceedings relating to orders for sale especially the fact that summons filed to enforce orders for sale are not 'actions'.

[56] This lacuna is also apparent from the fact that England does not subscribe to the Torrens system. By parity of reasoning, s 18 of the UK Limitation Act 1939 subsequently reproduced in s 20 of the UK Limitation Act 1980 could not have been envisioned to apply to a Torrens-based system. Likewise, it similarly could not have been foreseen that our s 21(1) of the LA, without the necessary legislative modification, would cater to our provisions relating to orders for sale in the NLC.

[57] There is also another aspect to this s 21(1) in relation to an application for an order for sale. It must always be appreciated that in an application for an order for sale, it is the court which sells the land. Earlier decided cases had ruled and held that an order for sale is not an action, nor it is a judgment. The law is trite on this legal position.

[58] As clearly spelt out s 21(1) of the LA, only applies to 'an action'. It is an action to recover money secured by a mortgage or charge and has no application to the exercise of the statutory right of the charge under the NLC. In *Peh Lai Huat v MBF Finance Bhd* [2011] 3 MLJ 470, the Court of Appeal held that the Limitation Act would not apply to the statutory remedy of obtaining an order for sale under the NLC. His Lordship Gopal Sri Ram CJA, at p 473, explained the nature of an order for sale, quoting Seah SCJ in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 that:

> The claim of the appellant in the court below was in exercise of their statutory

> remedy against the respondent as chargor in default under the provisions of the National Land Code. The appellant's claim was not under a covenant but under the registered charge.
>
> ...
>
> Accordingly, section 21(1) of the Limitation Act 1953 which provides that: (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued' has no application to this case. The proceeding in the court below was not — to quote the words of the subsection — 'an action ... brought to recover any principal sum of money secured by a mortgage.'

[59] Abdul Aziz Mohamad CJA, at p 475 in *Peh Lai Huat* held that:

> The only reason why I decided that the appeal should be dismissed was the reason that is stated in para 3 of the judgment of my learned brother Gopal Sri Ram FCJ, that is, *that s 21(1) of the Limitation Act 1953 did not apply to the respondent's action because it was not an action brought to recover any principal sum of money secured by a charge but was an action in exercise of the right to the statutory remedy of an order for sale*. (Emphasis added.)

[60] The Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 at p 258, held that the claim of the appellant for an order for sale was merely in the exercise of a statutory remedy as chargee.

[61] In *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221, Visu Sinnadurai J at p 228 of the judgment observed that:

> It is clear from these provisions of the NLC that the law confers a special statutory right on the chargee to obtain an order for sale. This right of the chargee is independent of any other causes of action which the chargee may have against the chargor under the charge, or under any other law. The remedy of the chargee to obtain an order for sale may therefore be described as a 'statutory right' conferred on the chargee by the NLC. Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 SCR 197 described this right of the chargee as follows (at p 309):
>
> > The order for sale confers on the chargee only the statutory right to a judicial sale. A sale under ss 256 or 260 of the NLC is a judicial sale ordered by the court on the application of the chargee.
>
> The point that needs emphasis is that, the remedy of the chargee under the NLC is a special remedy. The action brought by the chargee, and the adjudication of it by

A the courts, are different to that when other causes of action are instituted by the chargee ...

The chargee may, if he so chooses, besides resorting to this statutory right, pursue any other cause of action against the chargor for the money lent to the chargor. He may sue for a debt, or on a guarantee (if any), or on the contract.

B

[62] Section 21(1) of the LA bars an action for recovery of monies secured by a charge or mortgage. It should not bar the charge action for a sale of the security. In *Wong Soon Kion v Cimb Bank Bhd* [2018] MLJU 1847, the Court of Appeal said, at para 7 that:

C

In the first instance, it is necessary to recognise that the plaintiff *qua* chargee's application in the court below for an order for sale was in exercise of their statutory remedy under a registered charge against the defendant *qua* chargor in default of the provisions of the NLC. Subsection 256(3) of the NLC enjoins the court to make the order for sale unless it is satisfied of the existence of cause to the contrary.

D

[63] The Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 at p 122, held that 'A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt'. In *Kandiah Peter v Public Bank Bhd*, the Supreme Court at p 122 observed that:

E

F A chargee who makes an application for an order for sale in foreclosure proceedings under section 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under section 256 of the Code is not a judgement or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

G

This is true, since as a chargee he is merely asking that the security that he holds be sold.

H

[64] This court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 had once again restated the trite legal position that an order for sale made pursuant to s 256 of the NLC is not a judgment as it is purely an exercise of statutory remedy against a defaulting chargor under the NLC.

I

[65] Whilst acknowledging that the statutory defence of limitation does not apply to an application for an order for sale, there are other available defence legal and equitable available to the defaulting chargor. Since statutory

limitation cannot apply, can the chargee take its own time, to enforce a charge? The Court of Appeal had expressed this concern as observed at para 65, of the grounds of judgment below:

> If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal*, the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s 253, would have been rendered meaningless and of no effect. If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the *ad rem* right of order of sale.

[66] If the chargee bank takes forever to act or to enforce the charge, defences such as laches, acquiescence and other equitable defences may be pleaded against it. After all, s 256(3) of the NLC allows the chargor to raise the cause to the contrary when it states that:

> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of *cause to the contrary*. (Emphasis added.)

A chargor may therefore resist an application for an order for sale if he may establish 'cause to the contrary'. This phrase received interpretation by this court in *Low Lee Lian v Ban Hin Lee Bank Bhd*. The phrase encapsulates three situations as to when a cause to contrary may set in. At the same time it demonstrated that a cause to contrary may occur when it is a breach of any rule of law or equity. In the words of Gopal Sri Ram JCA (sitting in the Federal Court), at pp 83–84:

> Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its *grant would be contrary to some rule of law or equity*. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 at p 298 where he said:
>
> > I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; *and it seems to me that a chargor may 'show cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States*. (Emphasis added.)

[67] The case of *Phileoallied Bank (Malaysia) Bhd v Sakuntalathevy Manickavasagam* [2007] 1 MLJ 581, was where after ten years had elapsed the chargee decided to enforce the charge. The chargor pleaded laches and acquiescence. The learned judge, however, found that the chargee has indeed provided a credible explanation for the delay and that in any event, the chargor did not come to court with clean hands and was thus considered disentitled from raising an equitable defence. The High Court in the case did not rule out the possibility of pleading said equitable defences. On its own facts, it was denied by the High Court because the chargee had given acceptable explanation for taking such a long time. Therefore, while a chargor may not avail himself of a statutory limitation defence, it does not mean that he is precluded from raising an equitable defence.

[68] In view of the above discussions, I will proceed to answer the first leave question posed below:

> Whether proceedings commenced by a chargee for sale of land pursuant to section 256 or section 260 of the National Land Code 1965 is subject to section 21(1) or section 21(2) of the Limitation Act 1953.

Premised on the reasons that I have stated earlier, my answer will be, the proceedings commenced by a chargee for sale of land pursuant to ss 256 or 260 of the NLC is therefore not subjected to s 21(1) of the LA.

[69] I will now deal with s 21(2) of the LA as posed on the above leave question. This section clearly applies to a foreclosure action in respect of a mortgaged personal property. The phrase 'personal property' is defined to exclude land. This provision, therefore, applies to any other property excluding land or chattels real. Since an application for an order for sale always involves land, s 21(2) has no application to a charge action, in any event.

[70] In view of the above, I do not find it necessary to deal with the other leave questions posed. On the reasons as stated, I agree that the appeal should be allowed with costs.

[71] My learned brother Justice Mohd Zawawi Bin Salleh FCJ had read this judgment in draft and had expressed his agreement with this judgment.

Appeal allowed with costs.

Reported by Ashok Kumar